IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,747

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

versus

MRS. IRENE BOOTH MOORE,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

PETITION OF LOUISIANA & ARKANSAS RAILWAY COMPANY, APPELLANT, FOR A REHEARING.

Comes Louisiana & Arkansas Railway Company, Appellant, through undersigned counsel, and shows the Court that a rehearing should be granted herein and assigns the following grounds therefore, viz:

1. The Court (p. 7 opinion) states that the use by the trial Court in the charge of the phrase "other members of the crew" was probably an inaccuracy but could **hardly** (emphasis ours) be said in itself to constitute a refusal to charge Appellant's theory of the case, and (on p. 8) that the jury **could hardly** (emphasis ours) be thrown into confusion at the last moment by the use of

a single technically inaccurate phrase; this deprives defendant of something to which it is entitled, viz: A complete and correct instruction on its theory of its defense.

2. The Court (p. 8) approves the trial Court's commingling of the issue of sole proximate cause with the alternative issue of contributory negligence.

3. The Court denies defendant-appellant the right to a specific, clear and unconfused instruction on its theory of the case.

4. The Court approves the denial to defendant-appellant of a new trial in order that such an instruction could be given to the jury.

WHEREFORE it prays that a rehearing herein be granted.

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CERTIFICATE OF GOOD FAITH

Alexandria, Louisiana
February ....., 1956

I hereby certify that this petition for a rehearing is presented in good faith and not for delay.

.....
T. W. HOLLOMAN

CERTIFICATE OF SERVICE

Alexandria, Louisiana
February ....., 1956

I hereby certify that a copy of this petition has this day been mailed to Messrs. Booth, Lockard, Jack & Pleasant, 204 Johnson Building, Shreveport 23, Louisiana, Attorneys for Appellee.

.....
T. W. HOLLOMAN

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BRIEF OF LOUISIANA & ARKANSAS RAILWAY COMPANY, APPELLANT, ON ITS PETITION FOR A REHEARING.

May It Please the Court:

Paragraph 27 of defendant's answer (R. 26) sets up its defense. We quote: "Defendant alleges that the collision between the two trains referred to in the complaint was due solely to the negligence of Benjamin T. Moore, plaintiff's deceased, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the movement of train Extra 51-A North were complied with. Such duties were his responsibility and only his responsibility. To perform them was the reason that Trainmaster Moore was in-

structed to ride this train. These duties and responsibilities **could be delegated by him to members of the crew."** (emhpasis ours).

The portion of the charge complained of is at that point in the context of the charge where the jury was given the first strong impression of defendant's defense. After several pages devoted to the contentions of plaintiff, the Court (R. 435, 436) has a paragraph and a sentence on what defendant denies, and then proceeds (R. 436) as follows: "It affirmatively alleges that the collision between the two trains was due solely and proximately to the negligence of Mr. Moore, plaintiff's deceased husband, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the movement of troop trains were complied with, such duties being his responsibility and only his responsibility, it being contended that their performance was the reason that Mr. Moore was nstructed to ride this train and that his duties and responsibilities **could not be delegated by him to OTHER members of the crew."** (emphasis ours)

We do not have here any "technically inaccurate" (brief p. 8) phrase. It is defendant's chief and outstanding defense and the Court's statement is made to the jury at the outset of a discussion of defendant's contention and position. **"OTHER members of the crew"** (emphasis ours) instead of "members of the crew" tells the jury by the strongest statement of the Court that Moore was a member of the crew or leaves that conclusion unavoidable.

Who can measure the effect of this statement on the jury? Who can count the stars?

The plaintiff had spent hours laying the blame on the crew with great pages of black letter emphasis (such as were exhibited in Court room at the argument). Defendant had also shown that the first duty to stop the train was in the crew.

It had pleaded and its counsel had argued that Moore had a separate duty that could not be delegated, and now the jury is told by the Court that defendant's position is that he could not delegate it to any other member of the crew.

Nobody can paint the impression on the minds of jurors. It won't do to say that "hardly" could a juror think this or that. It is impossible to say that the verdict may not be due to this error. Error is error. We do not understand that a litigant's rights are to be based on what Courts think that a jury could "hardly" be influenced by. Particularly when the error is at the heart of the case.

> "All the perfumes of Arabia will not sweeten this little hand."

Either by a directed verdict or a new trial defendant was and is entitled to trial by a jury to which could be given a complete and correct instruction as to what the defense is.

The rule appears to be undisputed that as against a mere general or abstract charge a party is entitled to a specific instruction on his theory of the case. Defendant here was denied that right by the refusal of its requested instruction No. IV, either in its tendered form or in a restatement of its material substance.

The Courts state that the right given by Rule 51 of the Federal Rules of Civil Procedure to request instructions is a valuable right.

We have covered this by excerpts and citations at pp. 30-31 of our original Brief to which we respectfully refer the Court. For convenience we list here a few pertinent cases.

C. & N. W. Ry. Co. v. Green, 164 F. 2d 55, 61

Montgomery v. Virginia Stage Lines, 191 F. 2d 770, 772

C. R. I. & P. R. R. Co. v. Lint, 217 F. 2d 279, 285

Paramount Film Distributing Corp. v. Applebaum, 217 F. 2d 101, 123 (5th Cir.)

Northern Central Coal Co. v. Hughes, 224 F. 2d 57, 59

The Court (p. 8 opinion) approves the comparison of the sole proximate defense with the contributory negligence rule. Our objection was to this paragraph. (R. 442)

> "If you determine that Mr. Moore's death was wholly or in part due to the negligence of the railroad's other agents or employees, the defendant may be held liable for damages in such amount as you may find would be due the plaintiff, even though there was more than one cause. Of course, in this connection, you should keep in mind, if you find them applicable, the rules regarding contributory negligence which we will give you later in this charge."

This, we feel, was prejudicial in referring to recovery by plaintiff even should there be more than one cause of the accident, and in the same breath, to contributory

negligence. Contributory negligence was pleaded in the alternative, which is not mentioned.

These things are different and not to be compared under the defense that was raised.

We respectfully submit that a rehearing should be granted for the reasons set forth in our petition for rehearing.

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